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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-324

SIDNEY S. HICKLIN, RUBY E. DORMAN, BETTY CLOUD, TOMMY RAY WOODRUFF, FREDERICK A. MATHERS, HARRY A. BROWNING, EMMETT RAY, and JOSEPH G. O'BRIEN,

Appellants,

v.

EDMUND ORBECK, Commissioner of the Department of Labor of the State of Alaska, and GUY RICHARD MARTIN, Commissioner of the Department of Natural Resources of the State of Alaska,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ALASKA

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	Page
TABLE OF CASES AND AUTHORITIES	(ii)
OPINION BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
QUESTION PRESENTED	2
FACTUAL STATEMENT	2
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I. Alaska Hire Directly Contravenes The Privileges And Immunities Clause	9
A. History of the Privileges and Immunities Clause	9
B. An Examination of This Court's Prior Decisions Involving the Privileges and Immunities Clause Does Not Reveal Any Justification for Alaska Hire	13
C. The State Ownership Theory of McCready v. Virginia Is Neither Apposite Nor Viable	17
D. By Analogy Cases Decided Under the Commerce Clause Preclude Alaska Hire	28
II. Alaska Hire Is In Contravention Of The Fourteenth Amendment	34
A. Equal Protection	34
B. Right to Travel	43
CONCLUSION	47

TABLE OF CASES AND AUTHORITIES

Cases

Austin v. New Hampshire, 420 U.S. 656 (1975) 12, 27, 35, 36

Baldwin v. Fish and Game of Montana, 76-1150 21

Blake v. McClung, 172 U.S. 239 (1898) 38

Brown v. Anderson, 202 F.Supp. 96 (Alaska 1962) 26

C.D.R. Limited v. Board of Education of the City of New York, 412 F.Supp. 1164 (1976), *aff.* __ U.S. __, 97 S.Ct. 721 (1977) 35, 42

Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) 13, 14, 18, 20, 22

Douglas v. Seacoast Products, __ U.S. __, 52 L.Ed.2d 308 (1977) 9, 21, 26

Dunn v. Blumstein, 405 U.S. 330 (1972) 46

Edwards v. California, 314 U.S. 160 (1941) 30

Foster Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) 9, 21, 29, 31

Geer v. Connecticut, 161 U.S. 519 (1896) 20, 22, 40

Graham v. Richardson, 403 U.S. 365 (1971) 35, 37, 42

Hughes v. Alexandria Scrap Corporation, 426 U.S. 794 (1976) 31

Kleppe v. New Mexico, 426 U.S. 529 (1976) 27

Lemon v. People, 20 N.Y. 607 (1860) 17, 36

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 35

Mathews v. Diaz, 426 U.S. 67 (1976) 9, 36

McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645 (1976) 44

McCready v. Virginia, 94 U.S. 391 (1877) ..... *passim*

Cases, continued

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 7, 44

Mullaney v. Anderson, 342 U.S. 415 (1952) 24

Oklahoma v. Kansas Natural Gas, 221 U.S. 229 (1911) 9, 29

Oyama v. California, 332 U.S. 633 (1948) 35

Paul v. Virginia, 8 Wall. 168 (1869) 16, 25, 36, 38

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 29

San Antonio School District v. Rodrigues, 411 U.S. 1 (1973) 34

Shapiro v. Thompson, 394 U.S. 618 (1969) 9, 43

Slaughterhouse Cases, 16 Wall. 36 (1873) 12

Sugarman v. Dougall, 413 U.S. 634 (1973) 36

Takahashi v. California Fish and Game Commission, 334 U.S. 410 (1948) 26, 30, 35, 39

Toomer v. Witsell, 334 U.S. 385 (1948)..... *passim*

Ward v. Maryland, 12 Wall. 418 (1871) 15

Alaska Statutory Provisions

Alaska Statutes 38.40.050(a) 4

Alaska Statutes 38.40.090 5

Alaska Statutes 43.19 20

Alaska Statutes 43.57.010 20

Alaska Statutes 43.58 20

8 AAC 35.080 5

8 AAC 35.011 3

8 AAC 35.014-015 3

United States Statutory Provision

Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719 4

United States Constitutional Provisions

Article IV, Section 2 9

14th Amendment, Section 1 34

Treatises and Other Secondary Material

2 M. Farrand, *The Records of The Federal Convention of 1787* 12

3 M. Farrand, *The Records of The Federal Convention of 1787* 11

5 Journal of the Continental Congress, 547 (1906) 10

9 Journal of the Continental Congress, 888-9 (1906) 10

9 Journal of the Continental Congress, 908-9 (1906) 11

W. J. Meyers, *The Privileges and Immunities of Citizens in the Several States,* 1 Mich. Law Rev. 286 (1902) 35

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OPINION BELOW

The opinion of the Supreme Court of the State of Alaska is reported at 565 P.2d 159 (1977) and is set out in full in Appendix I of appellants' Jurisdictional Statement.

JURISDICTION

The mandate of the Supreme Court of the State of Alaska was entered on June 13, 1977. Notice of appeal and the jurisdictional statement were filed within ninety (90) days of that date. Probable jurisdiction was noted on October 31, 1977. This Court's jurisdiction is invoked under 28 U.S.C. 1257(2).

STATUTORY PROVISIONS INVOLVED

Chapter 40, Title 38, Alaska Statutes, entitled "Local Hire Under State Leases" (Alaska Hire), is set forth in the Appendix.

Administrative Regulations have been adopted by the Alaska Department of Labor to implement Alaska Hire. They are set forth in Appendix III of appellants' Jurisdictional Statement.

QUESTION PRESENTED

May the State of Alaska require private employers involved in any oil and gas activities resulting from leases with the State to first hire and last fire Alaska residents in preference to the residents of the other States?

FACTUAL STATEMENT

On January 3, 1959, President Eisenhower executed "A Proclamation" which enabled Alaska to officially become the forty-ninth State of the Union. Section One of the Alaska Statehood Act as passed by the 85th Congress[1] provided that "the State of Alaska is hereby declared to be a State of the United States of America

[1] Public Law 85-508 (72 Stat. §339).

[and] is declared admitted into the Union on equal footing with the other States in all respects whatever. . . ."

Thirteen years later the Legislature of the State of Alaska added Chapter 40 to Title 38 of its statutes which deals with lands. This new law, the constitutionality of which is here at issue, was designated "Local Hire Under State Leases" and has come to be known as Alaska Hire.[2]

In its opinion the Supreme Court of the State of Alaska described Alaska Hire:

> 'Alaska Hire', enacted in 1972 and amended in 1976, requires that all oil and gas leases, easements or right-of-way permits for oil or gas pipelines, unitization agreements or any re-negotiation of any of these to which the state is a party, contain a requirement that qualified Alaska residents be hired in preference to non-residents.

Juris. App. I, p. 2a.

In addition to this first hired requirement, regulation 8 AAC 35.011 (Juris. App. III, p. 39a) requires non-residents to be fired before Alaska residents. The method of enforcement chosen for Alaska Hire is a scheme of residency identification cards. *See* Cease and Desist Order of Appellee Orbeck, App. IV.[3]

[2] The law as amended is set out in full in the Appendix. Regulations as adopted by the Alaska Department of Labor relating to the inplementation and enforcement of Alaska Hire are set forth in Appendix III (commencijg on page 38-A) of appellants' Jurisdictional Statement, hereinafter Juris. App.

[3] Residency must be affirmatively demonstrated prior to the issuance of a "certificate of residence" 8 AAC 35.014-015 (Juris. App. III, pp. 40a-41a), which is good for two years. Residency is defined by AS 38.40.090 and is the equivalent of domicile. Juris. App. II, pp. 36a-37a.

Speaking to the breadth of Alaska Hire the majority of the Alaska Court found that:

> The number of jobs covered by the law varies with the number and size of petroleum and pipeline projects in progress. In June 1976, the commissioner of labor testified that it applied to about 12,000 jobs, approximately 6 percent of the total employment in the state.[4]
>
> Alaska Hire applies to the oil pipeline now in the final stages of construction. It will apply to any natural gas pipeline. Should any oil and gas leases ever be renegotiated, it will apply to them. It will apply to offshore oil and gas development under state leases. The present North Slope oil and gas leases are not covered since they were entered into prior to July 7, 1972, the effective date of AS 38.40. *See* AS 38.40.050(a).[5]

Juris. App. I, p. 2a.

The two dissenting Alaska Justices believed the target of Alaska Hire to be even broader:

> Only if qualified Alaska residents are unavailable, may others be employed. The provisions of the act

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[4]Witness David Finrow, Alaska Hire program administrator, testified that as of June 1976, of some 36,000 applicants for residency cards, 28,000 had qualified as residents. Finrow Dept., p. 8.

[5]A significant portion of the natural gas pipeline recently approved by President Carter and Congress will be constructed in Alaska. *See* Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719, *et seq.* A national interest in Alaska natural gas is described in the Act and set forth *infra.*

The testimony of Appellee Martin indicates that resulting employment in Alaska may be as great as with the oil pipeline. (Martin Dep., p. 7.)

> apply also to all employment which is the result of oil and gas leases, easements, leases or right-of-way permits for oil or gas pipeline purposes and unitization agreements. Thus, the act appears to include employment opportunities at refineries and in distribution systems utilizing oil and gas obtained under Alaska leases.

Juris. App. I, p. 23a.

Alaska Hire also applies to the work of "suppliers" on non-State-owned lands who are not parties to any lease with the State. *See* 8 AAC 35.080, Juris. App. III, p. 53a.

Alaska Hire was not seriously enforced until 1975. Juris. App. I, p. 3a. On March 1, 1976, Appellee Orbeck, Commissioner of the Alaska Department of Labor, issued the Cease and Desist Order concerning the enforcement of Alaska Hire as has been reproduced in Appendix IV to this brief.

On April 28, 1976, (R. 1-8) appellants filed a complaint in the Superior Court in Anchorage, Alaska seeking declaratory and injunctive relief from Alaska Hire.

The plaintiffs, here appellants, complained of both the one year durational residency requirement of Alaska Hire and the residency requirement *per se.* Five of the appellants are non-residents of the State of Alaska, principally being residents of the States of Washington and Oregon. One, a life-long Eskimo resident of Alaska, has lost his residency because he had been outside of the State for several months in the past year. Juris. App. I, p. 3a, R. 1-8. *See* AS 38.40.090 (Juris. App. II, pp. 36a-37a).

By agreement of the parties, a motion for a preliminary injunction was presented to the trial court and consolidated with the trial on the merits pursuant to Alaska Civil Rule 65(a)(2).[6] The case was submitted on affidavits, depositions and memoranda of law. Juris. App. I, p. 3a.

On July 21, 1976, the Superior Court in Anchorage denied all relief as prayed for in appellants' complaint, upholding Alaska Hire in its entirety. An appeal was taken the next day to the Supreme Court of the State of Alaska. Juris. App. I, p. 3a. On June 3, 1977, that Court issued its Opinion which is here appealed from.

The case below presented the Alaska Supreme Court with two major issues:

> . . . that the one year durational residency requirement violates the State and Federal equal protection clauses, and that any residency requirement violates the privileges and immunities clause of Article IV of the United States Constitution.

Juris. App. I, p. 3a.

The Alaska Supreme Court unanimously concluded that the one year durational residency requirement to qualify as an Alaska resident under Alaska Hire did in fact violate State and Federal equal protection clauses, and accordingly held that a durational residency requirement of more than thirty (30) days was not constitutionally permissible. Juris. App. I, p. 22a. A three justice majority did find, however, that a general

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[6]Identical to Federal Rule of Civil Procedure 65(a)(2).

bias in favor of actual Alaska residents in oil and gas employment was constitutionally acceptable.[7]

Appellants are here asking this Court to reverse this second holding and find such a general residency preference violative of the Constitution of the United States. Appellants commend the dissents of Justices Boochever and Rabinowitz, which recognized that "the local hire statute runs afoul of the concept of federalism", Juris. App. I, p. 27a, and concluded:

> If local hire is valid and each state may restrict to its own residents not only the utilization of its land and natural resources but also employment resulting from such use, then the concept of federalism would be effectively extinguished. Each state would become a separate and isolated enclave. I cannot believe that the Framers intended such a result and therefore conclude that the local hire statute is unconstitutional.

Juris. App. I, p. 29a.

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[7]Even though Alaska Hire contains legislative language that its purpose is to help unemployed Alaskans, the Alaska Supreme Court rejected such a transparency and interpreted the law simply to give an economic preference to all Alaskans:

> The trial judge referred to Alaska Hire as an attempt to solve "problems that may be typified as social, racial, educational, and economic." We are hesitant to clarify Alaska Hire as something other than an attempt to strengthen the Alaskan economy . . . We believe that the better alternative is to consider Alaska Hire an economic measure justified by the "natural resources exception," the principle that a state may prefer its residents in dealing with natural resources it owns.

Juris. App. I, p. 19a.

An interpretation of a state law by the highest court of that state is binding on this Court. *See Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256 (1974) and cases there cited.

SUMMARY OF ARGUMENT

Only if qualified Alaska residents are unavailable may the residents of other States be employed on any job which is the result of oil and gas leases, easements, leases, or right-of-way permits for oil or gas pipeline purposes and unitization agreements. Alaska Hire includes employment opportunities at refineries and in distribution systems utilizing oil and gas obtained under Alaska leases.

The history and purpose of the privileges and immunities clause of Article IV, Section 2 of the Constitution is to provide a milieu for national unity in which citizens of all States will be treated equally regardless of the location of their homes.

Alaska Hire is an example of a primitive and parochial favoritism that runs against the basic concept of the Union. If Alaska is able to resurrect and expand the ownership fiction and justify discrimination against the residents of other States, retaliation in kind will be the predictable order of the day.

Alaska desires both to have its oil and gas resources marketed in the other States and to discriminate against the residents of those States in any related employment. The inequities of this phenomena belie the efficacy of federalism as commanded by the privileges and immunities clause.

A majority of the Supreme Court of Alaska upheld Alaska Hire on the State-ownership theory of *McCready v. Virginia*, 94 U.S. 391 (1877), asserting that Alaska may use its resources discriminatorily to benefit its citizens. *McCready* has effectively been overruled by *Toomer v. Witsell*, 334 U.S. 385, 402 (1948) (*see also*

Douglas v. Seacoast Products, ____ U.S. ____, 52 L.Ed.2d 308, 319-320 (1977)).

The ownership cases themselves are distinguishable as they involve access to state property, not employment in a designated industry.

By analogy, cases decided under the commerce clause define some parameters of privileges and immunities and indicate that a State can not restrict its natural resources to its own use. *Oklahoma v. Kansas Natural Gas*, 211 U.S. 229 (1911). When resources such as Alaska oil and gas are placed in commerce, any ownership claims are relinquished. *Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1, 13 (1928).

Non-residency is a specific suspect class created by the privileges and immunities clause, and is analagous to alienage, *Mathews v. Diaz*, 426 U.S. 67, 85 (1976). Scrutiny reveals that non-residents are denied the equal protection of law by Alaska Hire.

Alaska Hire inhibits interstate travel by making Alaska unattractive to citizens of other States desiring to migrate, resettle, find a new job or start a new life. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969).

ARGUMENT

I.

ALASKA HIRE DIRECTLY CONTRAVENES THE PRIVILEGES AND IMMUNITIES CLAUSE.

A. History of the Privileges and Immunities Clause.

The Privileges and Immunities Clause of Section 2, Article IV of the Constitution of the United States provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

This clause had its predecessor in the Articles of Confederation.

On July 12, 1776, a committee of the Second Continental Congress proposed:

> Art. VI. The Inhabitants of each Colony shall heneceforth always have the same Rights, Liberties, Privileges, and Advantages, in the other Colonies, which the said Inhabitants now have, in all Cases whatever, except in those provided for by the next following Article.
>
> Art. VII. The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, and Advantages in Trade, Navigation, and Commerce, in any other Colony, and in going to and from the same and to any Part of the World, which the Natives of Such Colony Enjoy.[8]

On November 11, 1777, another committee proposed the inclusion of what was to become later the Fourth Article.[9] On November 15, 1777, the Continental Congress approved the inclusion of an article worded thus:

> The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall

[8] 5 Journal of the Continental Congress 547 (1906).

[9] 9 Journal of the Continental Congress 888-9 (1906).

> have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property, imported into any State, to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction shall be laid by any State on the property of the United States, or either of them.[10]

The privileges and immunities clause of Article IV, Section 2 of the Constitution was initially proposed by Charles Pinkney of South Carolina, who assured the Constitutional Convention that:

> The Fourth Article respecting the extending of the rights of the citizens of each state, throughout the United States [etc.] is found exactly upon the principles of the Fourth Article of the present confederation.

3 M. Farrand, *The Records of the Federal Convention of 1787*, p. 112.

On Tuesday, August 28, 1787, the following action was taken with respect to what was then referred to as Article XIV (now Article IV, Section 2):

> Art. XIV was taken up.
>
> Genl. Pinkney was not satisfied with it. He seemed to wish some provision should be included in favor of property in slaves.
>
> On the question (on art. XIV.)

[10] 9 Journal of the Continental Congress 908-9 (1906).

N.Y. ay. Mas. ay. Ct. N.J. ay. Pa. ay. Del. ay. Md. ay. Va. ay. N.C. ay. S.C. no. Geo. divided [Ayes – 9; noes – 1; divided – 1.]'

2 M. Farrand, *supra* p. 443.[11]

In the *Slaughterhouse Cases*, 16 Wall. 36, 75 (1873), the Court compared the privileges and immunities enunciation of the Articles with that of the Constitution.

> There can be but little question that the purpose of both these provisions is the same, and that the privileges and immunities intended are the same in each. In the Articles of the Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase.

More recently, in *Austin v. New Hampshire*, 420 U.S. 656 (1975), this Court discussed the history behind the clause.

> The [privileges and immunities] Clause thus establishes a norm of comity without specifying a particular subject as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment. The origins of the Clause do reveal, however, the concerns of central import to the framers. During the preconstitutional period, the practice of some States denying to outlanders the treatment that its citizens demanded for themselves was widespread . . . . The discriminations at which this clause

[11] This is all that exists of the actual Constitutional Convention record on the clause, other than references to the work of the Committee on Style. This concept of federalism, also reflected in the national motto, was apparently so fundamental to the Founders that it did not require debate.

> was aimed were by no means eradicated during the short life of the Confederation, and the provision was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation.

Ibid, p. 660, 661.

On this force for a single nation Alexander Hamilton wrote "It may be esteemed the basis of the Union".[12]

It is against this fundamental constitutional requirement of comity, unity and federalism that Alaska Hire must be tested.

B. An Examination of This Court's Prior Decisions Involving the Privileges and Immunities Clause Does Not Reveal Any Justification for Alaska Hire.

The first federal case interpreting the privileges and immunities clause is *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823). The case, decided by Associate Justice Bushrod Washington sitting as Circuit Justice, concerned a New Jersey law which provided in pertinent part:

> . . . that it shall not be lawful for any person who is not at the time an actual inhabitant and resident in this state, to rake or gather clams, oysters, or shells, in any of the rivers, bays, or waters in this state, on board of any . . . vessel, not wholly owned by some person, inhabitant of, and actually residing in this state; and every person offending herein, shall forfeit and pay . . . .

[12] Federalist CXXX.

In language very often quoted he described his perception of the general embrace of the privilege and immunities clause:

> The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise. . . . These, and many others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state, in every other state, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old articles of confederation) "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states of the Union."

Ibid, p. 551-552.

Justice Washington nevertheless upheld the exclusive taking by New Jersey residents of oysters, clams and shells stating that they belonged to those residents.

Corfield is readily distinguishable from the case at bar. The State of New Jersey was not restricting or

preferring to its residents employment in any job related to the oyster, clam, or shell industry. It limited only the actual taking of such shellfish to its residents. If New Jersey had discriminated against all non-residents in the shellfish industry, Justice Washington's description of the privileges and immunities of state citizenship would have been squarely compromised.

One of Justice Washington's prime reasons for upholding the limitation of access to fisheries resources was conservation. *Ibid*, p. 552. Such a justification has no application to the giving of preference to Alaska residents in any oil and gas related employment as there is no relationship between residency in employment and conservation of resources. Indeed, the employment in question specifically involves the depletion of non-renewable resources.

In *Ward v. Maryland*, 12 Wall. 418 (1871), the Court ruled unconstitutional a Maryland statute which prohibited the sale of goods, other than agricultural products and articles manufactured in Maryland in a certain district, by persons not residents in the State unless they first purchased a license. The Court stated:

> Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the Court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of the Citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in

> the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens. . . . [I]t follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that enacted by law of such permanent residents.

Ibid, p. 452-453 (citations omitted)

The Court thus specifically recognized the constitutional right of a resident of one State to travel to another State for the purpose of work, free from any discriminatory restrictions imposed by the other State.

As noted by the Court, *Paul v. Virginia*, 8 Wall. 168 (1869), is also helpful to this issue. The Court held that a corporation is not a citizen within the meaning of the privileges and immunities clause, and that accordingly a state law requiring foreign insurance companies in the State to file security before they issue policies was constitutional. In speaking of the privileges and immunities of Article IV, Section 2, Justice Field noted for the Court that:

> It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom

> possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Lemmon v. People, 20 N.Y. 607.
>
> Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

Ibid, p. 180.

Alaska Hire impresses the disability of alienage on non-residents, contrary to both the spirit and reality of Union.

C. The State Ownership Theory of McCready v. Virginia Is Neither Apposite Nor Viable.

The case of *McCready v. Virginia*, 94 U.S. 391 (1877), is the key and central case relied upon by the majority of the Alaska Supreme Court in upholding Alaska Hire. "We rely on the McCready 'natural resources exception' to the privileges and immunities clause." Juris. App. I, p. 18a. The question there determined was whether Virginia could prohibit citizens of other states from planting oysters in tidelands owned by the State of Virginia. The Court held that the planting of oysters was a local property right and not a

privilege or immunity of citizenship. Citing Justice Washington's opinion in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), the Court stated that:

> Such an appropriation is, in effect, nothing more than a regulation of the use by the People of their common property. . . . Following, then, this statutory rule, and looking only to the particular right which is here asserted, we think we may safely hold that the citizens of one State are not invested by this clause of the constitution with any interests in the common property of the citizens of an other state. If Virginia had by law provided for the sale of its once vast public domain, and a division of the proceeds among its own people, no one, we venture to say, would contend that the citizens of other states had a constitutional right to the enjoyment of this privilege of Virginia citizenship. . . . Oysters in the soil covered by water owned in common by the People of the State is not different in principle from that of planting corn upon dry land held in the same way. Both are for the purpose of cultivation and profit; and if the State in the regulation of its public domain, can grant to its own citizens exclusive use of dry land, we see no reason why it may not do the same thing in respect to such as are covered by water.

Ibid, p. 396.

McCready is more distinguishable than *Corfield*. *McCready* did not concern a statute of Virginia which gave employment preference to all Virginians engaged in the oyster industry and its related suppliers. It narrowly concerned, and looked "only to the particular right . . . asserted," *Ibid*, p. 395, *access* to state owned fishing beds. "[E]ach state owns the beds of all

tidewaters in its jurisdiction." *Ibid*, p. 394. Appellants here seek no access to Alaska oil and gas. They wish only to be treated equally in employment opportunity.

Moreover, Alaska's assertion of exclusive ownership of oil and gas resources is seriously undercut factually by the national interest described by Congress in the Alaska Natural Gas Transportation Act of 1976, 15 U.S.C. 719:

> §719. Congressional findings.
>
> The Congress finds and declares that –
>
> (1) a natural gas supply shortage exists in the contiguous States of the United States;
>
> (2) large reserves of natural gas in the State of Alaska could help significantly to alleviate this supply shortage;
>
> (3) the expeditious construction of a viable natural gas transportation system for delivery of Alaska natural gas to United States markets is in the national interest; and
>
> (4) the determinations whether to authorize a transportation system for delivery of Alaska natural gas to the contiguous States and, if so, which system to select, involve questions of the utmost importance respecting national energy policy, international relations, national security, and economic and environmental impact, and therefore should appropriately be addressed by the Congress and the President in addition to those Federal officers and agencies assigned functions under law pertaining to the selection, construction, and initial operation of such a system.

Even though the State of Alaska believes it can discriminate against residents of the other States in oil and gas related employment under the ownership

theory, nonetheless it is willing to have its resources marketed in the other States in order to gain taxpayer revenues.[13] "In fact, the Alaska Pipeline has been constructed to the port of Valdez as a means of delivery of the oil to other states." Juris. App. I, p. 25a. This fact alone dramatically distinguishes Alaska Hire from the issues presented in *Corfield, McCready* and *Geer v. Connecticut*, 161 U.S. 519 (1896), the cases relied upon by the Alaska majority. Juris. App. I, p. 16a.[14]

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[13]Chapter 57 of Title 43 of the Alaska Statutes provides in part:

> Sec. 43.57.010. Oil and gas regulation and conservation tax.
>
> (a) There is levied upon the producer of oil a tax of one-eighth of one cent on each barrel of oil removed or sold from each lease or property in the state, less any part the the ownership or right to which is exempt from taxation.
>
> (b) The tax is in addition to and shall be administered and paid in the same manner as the taxes imposed on ch. 55 of this title. Producers of oil are required to make reports of production in the same manner and under the same penalities as required by ch. 55 of this title.
>
> (c) Proceeds from the tax shall be paid into the general fund. (§1 ch 5 FSSLA 1973)

Chapter 58 of Title 43, Alaska Statutes, provides for an Ad Valorem tax on oil and gas properties. Tax payer revenues are derived virtually exclusively from sales in other states. Alaska has also adopted the Multi-state Tax Compact, Chapter 19, Title 43, Alaska Statutes.

[14]In *Geer v. Connecticut*, 161 U.S. 519 (1896), the Court held that the police power of the State to preserve game birds as a valuable food supply for its people justified a statute prohibiting transportation of such birds beyond the State.

Geer is distinguishable on the same basis as *Corfield* and *McCready*. It concerns conservation and access to state owned game, not employment in the commercial game industry.

[footnote continued]

In *McCready* the Court specifically noted that, "There is here no question of transportation or exchange of commodities but only of cultivation and production." *Ibid*, p. 395. *See Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) *infra*.

The arguments before the Court in *McCready* also urged conservation as a justification for discrimination. The brief of Defendant in Error, State of Virginia, maintained (p. 2):

> If this doctrine be supported, it will be attended with consequences both novel and disastrous, not to Virginia only, but to all the States on the Atlantic border – all of which have oyster fisheries and other fisheries within their limits. These States will abandon the care of interests in which they find they have no separate and exclusive right, and the whole property will soon be exhausted and destroyed by such a promiscuous and common use of it as will inevitably ensue.

The Alaska majority said of *McCready*:

> *McCready v. Virginia, supra*, has been distinguished, but it has never been overruled. We

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According to Defendant in Error, State of Connecticut, the case concerned only fish and game laws, not natural resources in general. Their brief states (p. 5):

> It is believed that every State in the Union has its game laws, and that it is a matter that does not concern the government of the United States, and with which, fortunately, it has nothing to do. If it had it would hardly find time to give its attention to anything else.

Prior to *Toomer v. Witsell*, 334 U.S. 385, 402 (1948) (*see also Douglas v. Seacoast Products*, ___ U.S. ___, 52 L.Ed.2d 308, 319-320 (1977) it could have been argued that fish and game was in a special class distinct from other natural resources. *Baldwin v. Fish and Game of Montana*, 76-1150, pending before the Court may determine if *Toomer* only applies to commercial fish and game.

have concluded that it states the principle applicable to the decision of this case. . . . The natural resources of Alaska 'belong' to Alaska and to Alaskans in a way that, in our federal system, Alaska's society and economy in general do not.

Juris. App. I, p. 17a.

Justices Boochever and Rabinowitz comment tellingly in their dissent on this reliance. They set forth appellants' position before this Court.

> The majority opinion is based on an antiquated line of authority stemming from Corfield v. Corfield, [sic] 6 F. Cas. 546, 551-52 (No. 3,230) (C.C.E.D. Pa. 1823), where a local state fishery was held to be the common property of the people of the state. Accord, Geer v. Connecticut, 161 U.S. 519, 40 L.Ed. 793 (1896) (game birds); McCready v. Virginia, 94 U.S. 391, 24 L.Ed. 248 (1876) (fish). Each of the cases cited by the majority deals with fish or game. Corfield limited commercial fishing for shellfish to local fishermen; Geer pertained to game birds and McCready restricted the planting of oysters in Virginia waters to Virginians.
>
> The application of these cases has been severely limited by Toomer v. Witsell, 334 U.S. 385, 92 L.Ed. 1460 (1948). There the Court pointed out that McCready was its only prior decision upholding discrimination against commercial fishing or hunting by citizens of other states without advancing 'persuasive independent reasons justifying the discrimination.' The court refused to extend McCready beyond its facts and struck down a law whereby shrimp boats belonging to South Carolina residents were licensed for substantially lower fees than those of nonresidents.

McCready was distinguished on two grounds. First, the Court pointed out that, in contrast to the Virginia oysters, the South Carolina shrimp were free-swimming and migrating. Secondly, it emphasized that McCready involved regulation of inland waters while Toomer involved the marginal sea. Thus, casting serious doubt on the continued authority of McCready, it concluded:

> These considerations lead us to the conclusion that the McCready exception to the privilege and immunity clause, if such it be, should not be expanded to cover this case.

A rationale for state action more in keeping with the mobility of modern society was advanced:

> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have a power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other States.

The majority bases its holding on the theory that the natural resources of Alaska 'belong' to Alaska and Alaskans. Under this rationale, it has been held that certain state resources may be restricted for state use. But the law here in question is not aimed at restricting oil and gas use to Alaska. In fact, the Alaska Pipeline has been constructed to the port of Valdez as a means of delivery of the oil to other states.

Even assuming McCready has continued viability however, ready distinctions here, as in Toomer, render that case inapplicable. We are not dealing with any proprietary interest of a state in its fish and game. Nor is the statute with which we are concerned limited to the extraction of oil located on state lands. *The Alaska act goes much further and restricts non-resident employment not only in extraction of a natural resource, but also in the distribution or any other use resulting from its extraction. In fact, employment on the pipeline involves construction of a distribution system rather than extraction of the oil.* (emphasis supplied)

Juris. App. I, pp. 23a-26a.

As the dissent correctly points out, *Toomer v. Witsell*, 334 U.S. 385 (1948), severely limits if not overrules the *McCready* state ownership doctrine.[15] The majority in *Toomer* held that even though the license fee did not unduly burden interstate commerce, an additional fee on a discriminatory basis was without reasonable basis and, therefore, a violation of the privileges and immunities clause.[16] In speaking of the privileges and immunities clause the *Toomer* Court commented:

> The primary purpose of this clause, like the clauses between which it is located – those relating to full faith and credit and to interstate extradition of fugitives from justice – was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the

[15] *See also Mullaney v. Anderson*, 342 U.S. 415 (1952).

[16] Thus indicating that even closer scrutiny may be required under the privileges and immunities clause than under the commerce clause. *See* discussion, n. 21 *infra*.

same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation. 'Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.' Paul v. Virginia, 8 Wall. (U.S.) 168, 180, 19 L.Ed. 357, 360 (1868).

In line with this underlying purpose, it was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State . . .

> . . . It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States. (footnotes omitted)

Ibid, p. 395-397.

Alaska Hire discriminates against non-residents solely because they are residents of other States. It is admittedly a general economic preference for Alaska residents. Juris. App. I, p. 19a.

The *Toomer* Court concluded:

> Thus we hold that commercial shrimping in the marginal sea, *like other common callings*, is within the purview of the privileges and immunities clause. (emphasis supplied)

Ibid, p. 403.[17]

It is factually erroneous to refer to *McCready* as creating a natural resource exception; it speaks only of a tidal river planting ground exception. Limiting *McCready* to its facts as was done in *Toomer v. Witsell* limits it to the planting of oysters in tidelands of Virginia rivers.

In the very recent case of *Douglas v. Seacoast Products, Inc.*, decided on May 23, 1977, ____ U.S. ____, 52 L.Ed.2d 308 (1977) the Court again voiced its displeasure with the ownership fiction:

> In any event, '[t]o put the claim of the State upon title is,' in Mr. Justice Holmes' words, 'to lean upon a slender reed.' Missouri v. Holland, 252 U.S. 416, 434 (1920). A State does not stand in the same position as the owner of a private game preserve, and it is pure fantasy to talk of 'owning' wild fish, birds or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, have title to these creatures until they are reduced to possession by skillful capture. Ibid; Geer v. Connecticut, supra, 161 U.S. at 539-540 (Field, J., dissenting). The 'ownership' language of cases such as those cited by appellant must be understood as no more than a 19th-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.' Toomer v. Witsell, 334 U.S. 385, 402 (1948); see also Takahashi v. Fish & Game Commission, 334 U.S. 410, 420-421 (1948). *Under modern analysis the question is simply whether the State has exercised its police power in conformity with the federal laws and Constitution.* As we have demonstrated above, Virginia has failed to do so here.
>
> Our decision is very much in keeping with sound policy considerations of federalism. . . . Each State's fishermen eventually might be effectively limited to working in the territorial waters of their residence, or in the federally controlled fishery beyond the three-mile limit. Such proliferation of residency requirements for commercial fishermen would create precisely the sort of Balkanization of interstate commercial activity which the Constitution was intended to prevent. See, e.g., H. P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 532-539 (1949); c.f. Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974).

Ibid, pp. 319-320 (emphasis supplied).[18]

It is a slender reed which the State of Alaska believes permits it to require private employers to discriminate against residents of other States in substantially all oil and gas related activities in Alaska.

A recent general enunciation by this Court involving the privileges and immunities clause which underlines appellants' position and the sensitivity of the issue is found in *Austin v. New Hampshire,* 420 U.S. 656 (1975). There it was held that a state commuter's income tax, which falls exclusively on the incomes of non-residents and is not offset by other taxes imposed on residents alone, was a violation of the privileges and immunities clause. The Court noted:

> The privileges and immunities clause, by making non-citizenship or non-residence an improper basis

[17] "The ownership theory was put at rest," *Brown v. Anderson,* 202 F. Supp. 95, 102 (Alaska 1962).

[18] *See also Kleppe v. New Mexico,* 426 U.S. 529, 545 (1976).

for locating a special burden, implicates not only the individual's right to nondiscriminatory treatment, but also, perhaps more so, the structural balance essential to the concept of federalism.[19]

Ibid, p. 662.

The Court further stated:

Our prior cases, therefore, reflect an appropriately heightened concern for the integrity of the privileges and immunities clause by erecting a standard of review substantially more rigorous than that applied to state tax distinctions among, say, forms of business organizations or different trades and professions. (emphasis supplied)

Ibid, p. 663.

That integrity is specifically compromised by Alaska Hire.

D. By Analogy Cases Decided Under The Commerce Clause Preclude Alaska Hire.[20]

The particular dangers of discrimination against non-residents based on State ownership of resources has been pointed out by this Court in cases specifically related to

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[19]"Citizen" and "resident" may here be used interchangeably as the Supreme Court of Alaska recognized that the non-resident appellants were citizens of other states. Juris. App. I, p. 3a.

[20]A commerce clause claim was not directly advanced below. The Alaska Supreme Court ruled, however, that Alaska Hire did not violate the commerce clause:

> Accepting the premise that the United States has and should have one economy, we do not accept the offered conclusion that the government of Alaska can never make benefits available to citizens of Alaska in preference to citizens of other states.

Juris. App. I, p. 18a.

oil and gas utilization. In *Oklahoma v. Kansas Natural Gas*, 221 U.S. 229 (1911), the Court struck down an Oklahoma statute which attempted to restrict the export of natural gas from the State. Oklahoma attempted to justify the restriction on the ground that because the resource belonged to the people of the State, and could in fact be left undeveloped by the State, the State was free to impose any restriction it desired on what development did occur. The Court refused to sanction that sort of analysis, commenting that if the statute was allowed to stand, it would grant States powers which would literally destroy the nation. In the Court's words:

> If the States have such power, a singular situation might results. Pennsylvania might keep its coal, the Northwest its timber, the mining States their minerals. And why may not the products of the field be brought within the principle. . . . If one State has it, all States have it; embargo may be retailiated by embargo, and commerce will be halted at State lines. In such commerce, instead of the States a new power appears and a new welfare – a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made greater by a division of its resources, natural and created, with every other State and those of every other State with it.

Of similar import is *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). The statute before the Court there was a West Virginia provision directed toward keeping within the State all natural gas there produced, which was required for local needs. The Court held that a State could not accord to its own consumers a preferred right of purchase over consumers in other States. *See also Foster Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) and

Takahashi v. California and Game Commission, 334 U.S. 410 (1948), *infra.*

The Supreme Court of Alaska attempted to distinguish these cases because they were decided under the commerce clause. Juris. App. I, p. 18a. But the commerce and privileges and immunities clauses are directly analogous and have similar roots. *See* Discussion of Articles of Confederation, *supra.* They have for the same purpose a national unity, one economic and the other human. Cases involving either are therefore mutually relevant. Justice Douglas' concurrence in Edwards v. California, 314 U.S. 160 (1941), is instructive in this regard. The majority held invalid under the commerce clause a state law making it a crime to assist indigent non-residents to enter the State. Justice Douglas (joined by Justices Black and Murphy) concurred but felt that the case should not have been decided under the commerce clause. "But I am of the opinion that the right of persons to move freely from State to State occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines. . . ." *Ibid,* p. 177. Justice Jackson stated in his concurrence:

> But the migrations of a human being, of whom it is charged that he possesses nothing that can be sold and has no wherewithal to buy, do not fit easily into my notions as to what is commerce. To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights. I turn, therefore, away from principles by which commerce is regulated to that clause of the Constitution by virtue of which Duncan is a citizen of the United States and which forbids any State to abridge his privileges or immunities as such.

Ibid, p. 182.[21] This court impliedly recognized the similarity of commerce clause and privileges and immunities interests in *Hughes v. Alexandria Scrap Corporation,* 426 U.S. 794 (1976):

> The [Commerce] Clause was designed in part to prevent trade barriers that had undermined efforts of the fledgling States to form a cohesive whole following their victory in the Revolution. This aspect of the Clause's purpose was eloquently expressed by Mr. Justice Jackson:
>
> > 'Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign states will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality. . .' Hood & Sons v. Du Mond, supra, at 539, 93 L.Ed. 865, 69 S.Ct. 657.

Ibid, pp. 807, 808.

Foster Fountain Packing Co. v. Haydel, 278 U.S. 1, (1928) is relevant. It recognized that where Louisiana

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[21] Because of its facts the privilege and immunity in *Edwards* was of national citizenship. But the same analogy may be drawn with state citizenship. Alaska oil and gas are in commerce and employment discrimination relating thereto should be considered more protected than the commerce itself, not less so. A commerce clause violation therefore establishes *ipso facto* an ancillary privilege and immunity infringement.

laws had declared that the State owned all shrimp within the waters of the State but permitted ultimate sale and shipment of shrimp for consumption outside the state boundaries, the State was accordingly denied the power under the commerce clause to require local processing as a prerequisite to out-of-state transportation. The court specifically noted:

> But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the state necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control. Clearly such authorization and the taking in pursuance thereof put an end to the trusts upon which the state is deemed to own or control the the shrimp for the benefit of its people.

Ibid, p. 13. The analogy to Alaska Hire is precise and the distinction of the facts from *McCready* clear. By allowing Alaska oil and gas to go into commerce Alaska has relinquished any hold on ownership.

To uphold Alaska Hire will be inviting each State to adopt laws to prefer its own residents in any employment having to do with natural resources. This does not offer a justification for Alaska Hire.

> Nor can discrimination be corrected by retailiation; to prevent this was one of the chiefs ends sought to be accomplished by the adoption of the constitution. *Travis v. Yale and Towne Manufacturing Co.,* 252 U.S. 60, 81 (1920).

The constitutional problem with Alaska Hire and the entire ownership theory is the inherent compromise of federalism. The dissent notes in this regard that:

> Moroever, the rationale behind the statute could be applied to all leases of state lands. Under the Alaska

> Statehood Act, Alaska was authorized to select in excess of 103,000,000 acres of land. As a condition to utilizing the natural resources, whether by mining, agriculture or timber industry, provisions in the leases could require preferential hire of residents. Such provisions could specify a local preference in all employment resulting from the leases. *Thus, nonresidents could be barred from dairy, agricultural, mining and lumber industries established on state lands, as well as from employment in any processing or manufacturing resulting therefrom. There is nothing in McCready to suggest that such a pervasive restriction of nonresident employment would be constitutionally permissible.*
>
> * * *
>
> In any event, preference for resident employees may not be upheld on the basis of the economic benefits derived by the state. . . *It takes little imagination to see that if Alaska's local hire law is constitutional because of economic benefits to its residents, each state could justify restricting to its own residents not only the utilization of its lands and natural resources, but also employment resulting from such use.* (emphasis supplied).

Juris. App. I, pp. 26a, 27a.

II.

ALASKA HIRE IS IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT.

Section 1 of the 14th Amendment to the Constitution of the United States provides:

ARTICLE XIV

§1. *Citizenship rights not to be abridged by states.* All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.[22]

A. Equal Protection

Under the contemporary two-tiered approach to equal protection, as recently discussed by the Court in *San Antonio School District v. Rodrigues*, 411 U.S. 1, 98-110 (1973), legislation discriminating against a suspect class or affecting a fundamental right is subjected to strict scrutiny, requiring the demonstration of a compelling state interest. The means selected to vindicate the State interest should be tailored so as to be the least drastic to classes adversely affected. Appellants believe that as non-residents of Alaska they belong to a suspect class that is

[22]Appellants raised a 14th Amendment claim below. "They allege that it violates both the equal protection and privilege and immunity clause." Juris. App. I, p. 11a.

being discriminated against. The Supreme Court of Alaska rejected any fundamental right argument, Juris. App. I, p. 12a, citing *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) which established that there is no right to governmental employment.[23]

In *Rodrigues* it was held that a suspect class was one that was "saddled with such disabilities or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Ibid*, p. 28. A non-resident in Alaska is powerless to change Alaska Hire as he cannot vote in Alaska. Appellants argue that the privileges and immunities clause of Section 2, Article IV specifically creates and identifies non-residency as a suspect class.[24] Discrimination because of residency is most nearly comparable to discrimination because of alienage, which is a suspect class. On many occasions this Court has held that alienage is a suspect classification, and that any regulation discriminating against such a class is subject to strict scrutiny in an equal protection analysis. *See Graham v. Richardson*, 403 U.S. 365 (1971), *Oyama v. California*, 332 U.S.

[23]While employment may not be a fundamental right under the 14th Amendment, equal access to employment in the common occupations can be said to be such a right. *Toomer v. Witsell*, 334 U.S. 385, 403 (1948) *supra*, and *Takahashi v. Fish and Game Commission*, 334 U.S. 410, 416 (1948) *infra*. *See also C.D.R. v. Board of Education of the City of New York*, 412 F.Supp. 1164 (1976), aff. __ U.S. ____, 97 S.Ct. 721 (1977).

[24]That is not to say that, under the privileges and immunities clause, discrimination against non-residents may be permitted if a strict scrutiny test is withstood. *Austin v. New Hampshire*, 420 U.S. 656, 663 (1975) *supra*. The privileges and immunities clause itself has few exceptions. *The Privileges and Immunities of Citizens in the Several States*, W. J. Meyers, 1 Mich. Law Rev. 286 (1902).

633 (1948), *Sugarman v. Dougall,* 413 U.S. 634, 641 (1973) and cases there cited.

In *Lemmon v. People,* 20 N.Y. 607 (1806), – cited in *Paul v. Virginia,* 8 Wall. 168, 180 (1869), and *Austin v. New Hampshire,* 402 U.S. 656 n. 7 (1975), – Judge Denio at page 608 comments:

> In my opinion the meaning is, that in a given State every citizen of every other State shall have the same privileges and immunities – that, is the same rights – which the citizens of the State possess. In the first place, they are not to be subjected to any of the *disabilities of alienage.* They can hold property by the same titles by which every other citizen may hold it, and by no other. Again, any discriminating legislation which should place them in a worse situation than a proper citizen of a particular State would be unlawful. (emphasis supplied)

Judge Wright, in the same case, at page 626, states:

> The provision was always understood as having but one design and meaning, viz – to secure the citizens of every State, within every other, the privileges and immunities (whatever they might be) accorded to its own citizens. It was intended to guard against a State discriminating in favor of its own citizens. A citizen of Virginia coming into New York was to be entitled to all the privileges and immunities accorded to the citizens of New York. He was not to be received or treated as an *alien* or enemy in the particular sovereignty. (emphasis supplied)

The Supreme Court of Alaska held that the alienage/non-residency analogy was undercut by this Court's opinion in *Mathews v. Diaz,* 426 U.S. 67 (1976). Juris. App. I, p. 14a. *Mathews* is not a 14th Amendment case, it was

decided under the due process clause of the Fifth Amendment. The case concerned a provision of the Social Security Act which granted eligibility for certain medical insurance to resident citizens 65 or over, but denied eligibility to similarly situated aliens unless they had been admitted for permanent residence and has resided in the country for at least five years. The Court held that the equal protection clause was inapplicable as Congress had no constitutional duty to provide aliens with the benefits provided to citizens.

In distinguishing *Graham v. Richardson,* 403 U.S. 365 (1971) *supra,* the Court stated that:

> The equal protection analysis also involves significantly different considerations because it concerns a relationship between aliens and the states rather than between aliens and the federal government.

Ibid, pp. 84, 85.

In language relevant to appellants' argument the Court stated:

> Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of the State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business. Furthermore, whereas the Constitution inhibits every State's power to restrict travel across its own borders,

> Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States.

Ibid, p. 85.

Mathews supports appellants' position that for equal protection purposes non-residency is directly analogous to alienage. Both are suspect classifications.

In discussing non-resident alienage and the privileges and immunities clause the Court in *Blake v. McClung*, 172 U.S. 239 (1898), commented:

> The constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one state in a condition of *alienage* when he is within or when he removes to another state, or when asserting in another state the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established. (emphasis supplied)[25]

Ibid, p. 257.[26]

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[25] *See also Paul v. Virginia*, 8 Wall. 168, 180 (1869) as cited in *Toomer v. Witsell*, 334 U.S. 395-397 (1948) *supra*.

[26] In speaking of privileges and immunities generally the Court stated:

> This court has never undertaken to give any exact or comprehensive definition of the words 'privileges and immunities,' in Article IV of the constitution of the United States. Referring to this clause, Mr. Justice Curtis, speaking for the court in *Conner v. Elliott*, 18 How. 591, 593, said: 'We do not deem it needful to attempt to define the meaning of the word "privileges" in this clause of the constitution. It is safer,

[footnote continued]

In *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948), issued the same day as *Toomer Witsell*, 334 U.S. 385 (1948), the Court overturned a California statute forbidding the issuance of commercial fishing licenses to aliens ineligible for citizenship. The decision was made under the equal protection clause of the 14th Amendment. The Court commenced with an historical case analysis here relevant:

> We may well begin our consideration of the principles to be applied in the case by a summary of this Court's holding in Truax v. Raich, 293 U.S. 33, 60 L.Ed. 131, 36 S.Ct. 7, LRA 1916D 545, Ann Cas 1917B 283, not deemed controlling by the majority of the California Supreme Court, but regarded by the dissenters as requiring the invalidation of the California law. That case involved an attack upon an Arizona law which required all Arizona employers of more than five workers to hire not less than eighty (80) per cent qualified electors or native-born citizens of the United States. Raich, an alien who worked as a cook in a restaurant which had more than five employees, was about to lose his job solely because of the state law's coercive effect on the restaurant owner. This Court, in upholding Raich's contention that the Arizona law

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> and more in accordance with the duty of judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein. And especially is this true when we are dealing with so broad a provision, involving matters not only of great delicacy and importance, but which are of such a character that any merely abstract definition could scarcely be correct; and a failure to make it so would certainly produce mischief.'

Ibid, p. 249.

was invalid, declared that Raich, having been lawfully admitted into the country under federal law, had a federal privilege to enter and abide in 'any state in the Union' and thereafter under the Fourteenth Amendment to enjoy the equal protection of the laws of the state in which he abided; that this privilege to enter in and abide in any state carried with it the '*right to work for a living in the common occupations of the community*,' a denial of which right would make of the Amendment 'a barren form of words.' (emphasis supplied)

Ibid, pp. 415, 416. *See also Toomer v. Witsell*, 343 U.S. 385, 403 (1948), *supra*.

In an attempt to distinguish the supremacy clause aspects of the *Truax* case the California Supreme Court had held that the fishing provision there challenged fell within the rationale of a 'substantial public interest' doctrine. Speaking of the special public interest argument, this Court responded:

It is true that this Court did long ago say that the citizens of a state collectively own 'the tidewaters . . . and the fish in them, so far as they are capable of ownership while running.' The McCready Case upheld a Virginia law which prohibited citizens of other states from planting oysters in a Virginia tidewater river. Though the McCready Case has been often distinguished, its rationale has been relied on in other cases, including Geer v. Connecticut. That decision, where only the commerce clause was involved, sustained a state law that, in order to restrict the use of game to the people of the state, prohibited the out-of-state transportation of game killed within

the state. On the other hand where Louisiana laws declared that the state owned all shrimp within the waters of the state, but permitted ultimate sale and shipment of shrimp for consumption outside that state's boundaries, Louisiana was denied power under the commerce clause to require the local processing of shrimp taken from Louisiana marshes as a prerequisite to out-of-state transportation. In the absence of overriding federal treaties, this Court sustained a state law barring aliens from hunting wild game in the interest of conserving game for citizens of the state against due process and equal protection challenges. Later, however, the Federal Migratory Bird Treaty Act of [July 3] 1918 was sustained as within federal power despite the claim of Missouri of ownership of birds within its boundaries based on prior statements as to state ownership of game and fish in the Geer Case. The Court was of opinion that 'To put the claim of the State upon title is to lean upon a slender reed.' p. 434. We think that same statement is equally applicable here. To whatever extent the fish in the three-mile belt off California may be 'capable of ownership' by California, we think that 'ownership' is inadequate to justify California in excluding any or all aliens who are lawful residents of the State from making a living by fishing in the ocean off its shores while permitting all others to do so.

Ibid, pp. 420, 421 (citations omitted).

The same equal protection argument would be appropriate here. To whatever extent the State of Alaska may

in fact "own" Alaska's natural resources, such ownership is inadequate under the equal protection clause to justify Alaska in preferring its own residents over the residents of other States in any oil and gas related employment.

C.D.R. Limited v. Board of Education of the City of New York, 412 FSupp. 1164 (1976), aff. ___ U.S. ___, 97 S.Ct. 721 (1977), concerned contractors who had employed lawfully admitted resident-aliens and had subsequently been threatened with cancellation of their public contracts on the grounds that their employment of such aliens violated New York labor law. A three judge district court held that when the New York statute granted a preference in employment in building construction projects to citizens over aliens who were lawfully admitted residents, the statute violated the Equal Protection clause of the 14th Amendment. The equal protection language is appropriate for this case:

> The state has a duty to all its lawful residents, resident alien or citizen. It must try to see to it that they do not starve, that they have equal access to state public employment, as well as membership in the Bar, *and that they have equal access to private employment. Truax v. Raich, supra.* Its duty to reduce unemployment is as much a duty to the alien as to the citizen for the very reasons stated by Mr. Justice Blackmun and Mr. Justice Powell (in *Graham v. Richardson, supra.*).

Ibid, p. 1170.

Even though the *C.D.R.* aliens affected were "lawful residents" (taxpaying, and of a long term), the concept of equality between residents and non-residents is the same within the context of a national unity and purpose for the citizens of all states. A resident alien working in a

State should not have a higher status than a non-resident citizen of a sister State. Indeed, if Alaska Hire is valid, Alaska may discriminate against Washingtonians or Oregonians but not Canadians.

B. Right To Travel.

Alaska Hire also infringes upon the citizens' of the other states constitutionally guaranteed right to travel within the United States. In *Shapiro v. Thompson,* 394 U.S. 618 (1969), a state-imposed durational residency requirement for receipt of welfare benefits was found to be a denial of equal protection as it burdened the right to travel into the State. The Court spoke of the right to travel:

> We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision. It suffices that, as Mr. Justice Stewart said for the Court in United States v. Guest, 383 U.S. 745, 757-758, 16 L.Ed.2d 239, 249, 86 S.Ct. 1170 (1966):
>
> "The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.
>
> ". . . [The] right finds no explicit mention in the Constitution. The reason, it has been suggested, is that a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. In any event, freedom to travel throughout the United States had long been recognized as a basic right under the Constitution." (footnote omitted)

Ibid, p. 631. *See also Memorial Hospital v. Maricopa County,* 415 U.S. 205 (1974), and *Graham v. Richardson,* 403 U.S. at 375-76, *supra.*

In addressing the right to travel argument the Alaska Supreme Court held that:

> A residency requirement does not penalize the right of inter-state migration, unlike a durational residency requirement, because it does not burden those who have recently migrated interstate. Hence, it is not subject to strict scrutiny on that ground. (Citing *McCarthy v. Philadelphia Civil Service Commission,* 424 U.S. 645 (1976)).[27]

Juris. App. I, pp. 11a-12a.

Alaska Hire may no longer burden those who have in fact recently migrated to Alaska to become actual residents and lived there for thirty days. It does inhibit travel to Alaska by the citizens of other States who do not wish to become residents of Alaska or who are undecided. In a transient society citizens of the States may travel throughout the nation looking for places to live and work without necessarily migrating or having any intention of becoming residents of the State in which they seek employment or are working. Such movement, which may properly be termed traveling, is penalized when it is made significantly less likely to find work in Alaska unless resident status is obtained. It is not uncommon for residents of a State to write to prospective employers in another State. Particularly in Alaska, many jobs are secured this way. Meaningful inquiry is now forclosed with respect to oil and gas employment by Alaska Hire.

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[27] *McCarthy* was a public employment case involving a continuing residency requirement.

In *Shapiro* the Court noted that "[a]n indigent who desires to migrate, resettle, find a new job, and start a new life, will doubtless hesitate if he knows he must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence when his need may be most acute." *Ibid,* p. 629. Alaska Hire discourages persons desiring to migrate, resettle, find a new job, or start a new life from even attempting to come to Alaska and find an oil and gas job unless they are willing to make a commitment to residency.

In language appropriate to a privileges and immunities case, the Court stated in *Shapiro:*[28]

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. That proposition was early stated by Chief Justice Taney in the Passenger Cases, 7 How. 283, 492, 12 L.Ed. 702, 790 (1849):
>
> > "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

Ibid, p. 629.

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[28] Travel, commerce, and privileges and immunities have not only common roots but have for their common purpose a national unity. *See* Article IV of the Articles of Confederation, *supra.*

In *Dunn v. Blumstein*, 405 U.S. 330 (1972), this Court discussed the limits of permissible State infringement on travel:

> Shapiro did not rest upon a finding that denial of welfare actually deterred travel. Nor have other 'right to travel' cases in this Court always relied on the presence of actual deterrence. In Shapiro we explicitly stated that the compelling-state-interest test would be triggered by 'any classification which serves to penalize the exercise of that right [to travel. . . .' While noting the frank legislative purpose to deter migration by the poor, and speculating that '[a]n indigent who desires to migrate . . . will doubtless hesitate if he knows that he must risk' the the loss of benefits, the majority found no need to dispute the 'evidence that few welfare recipients have in fact been deterred [from moving] by residence requirements.' Indeed, none of the litigants had themselves been deterred. Only last Term, it was specifically noted that because a durational residence requirement for voting 'operates to penalize those persons, and only those persons, who have exercised their constitutional right of interstate migration . . . , [it] may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest.'

Ibid, p. 339-341 (emphasis in original, citations omitted, footnotes omitted).

It is urged that Alaska Hire impermissibly inhibits, burdens, and penalizes the right of citizens to freely travel by institutionalizing discrimination aimed at citizens of sister States.

CONCLUSION

The proper test to be applied is whether Alaska has exercised its power in conformance with the Constitution. It is submitted by appellants that Alaska has not. Alaska Hire significantly compromises the Founders' vision of a national unity.

Wherefore appellants request this Court to reverse the judgment of the Supreme Court of Alaska.

RESPECTFULLY SUBMITTED at Anchorage, Alaska, this 31st day of December, 1977.

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